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9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 In re:

13 SANTA CRUZ BERRY FARMING
14 COMPANY, LLC,

15 Debtor-in-Possession.

Case No. 15-51771-MEH
Chapter 11

Jointly administered with
No 15-51772

16
17 Also affects:
18 Only Affects:

19 CORRALITOS FARMS, LLC,

20 Debtor-in-Possession.

**CREDITORS' COMMITTEE REPLY
RE (I) K & M ENTERPRISE'S, LLC'S
MOTION FOR RELIEF FROM THE
AUTOMATIC STAY PURSUANT TO 11
U.S.C. § 362(d)(1); and
(II) CORRALITOS FARMS, LLC'S
MOTION RE REJECT JANUARY 2003
BUY/SELL AGREEMENT**

Date: August 13, 2015
Time: 10:30 a.m.
Place: Courtroom 3070
U.S. Courthouse
280 S. First St.
San Jose, CA 95118

Judge: Hon. M. Elaine Hammond

1 The Official Committee of Unsecured Creditors of Santa Cruz Berry Farming Company,
2 LLC (the “Committee”),¹ hereby submits this Reply concerning K & M Enterprise’s, LLC’S Motion
3 For Relief From The Automatic Stay Pursuant To 11 U.S.C. § 362(d)(1) (“Stay Relief Motion”), and
4 Corralitos Farms, LLC’S Motion Re Reject January 2003 Buy/Sell Agreement (“Motion Reject
5 Buy/Sell”), and states:

- 6 1. The Committee takes no position on whether debtor Corralitos may reject the January
7 2003 Buy/Sell Agreement with K & M Enterprises, LLC (“K&M”) under applicable
8 bankruptcy law.
- 9 2. However, there are concerns that should affect the scope of any relief from stay that
10 might be granted K&M to proceed under the Buy/Sell Agreement. These concerns, and
11 ways that the Court can alleviate them, are discussed below. K&M should not be granted
12 relief from stay unless such relief is appropriately conditioned.

- 13 a. There are already indications that the appraiser that K&M proposes to utilize
14 under the Buy/Sell Agreement may not produce a fair and unbiased result. For a
15 major example, proposed appraiser Jim Andersen states his value opinion will be
16 influenced by the fact that the K&M Operating Agreement contains no provisions
17 that require that any distributions be made to the members of K&M. Andersen
18 Decl., at p. 3:5-8 (in ECF 88-2).

19 This is quite wrong. The Operating Agreement for K&M, at p. 8, Sec. 14.02
20 (attached to Kelly Decl. Pt. I at ECF 88-3, p. 14), expressly provides that
21 available cash of K&M shall be distributed to members “[p]eriodically, but not
22 less frequently than at the end of each calendar quarter” Such a fundamental
23 misunderstanding on Mr. Andersen’s part at the outset is a matter of grave
24 concern.

- 25 b. Mr. Andersen’s proposed methodology for the appraisal shows weaknesses. He
26 does not discuss several of the factors standardly employed in appraisals of assets

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28 ¹ The Committee includes members who are creditors of Corralitos.

1 of closely held businesses in analogous settings where there is a desire not to sell
2 the asset, such as for example the fair market value determinations required in
3 filing Form 706 federal estate tax returns. Mr. Andersen does not indicate that he
4 would analyze the value of the business under the widely-employed and accepted
5 discounted cash flow method, nor that he would undertake to locate and utilize the
6 valuation of “comparables” from reasonably similar businesses. These
7 weaknesses suggest concern whether Mr. Andersen’s proposed work would meet
8 appropriate professional standards for reliability, and whether the result would be
9 a properly appraised fair market value for the Debtor’s interest in K&M.

10 c. K&M’s opposition papers to the Buy/Sell Motion reflect some of the
11 inadequacies already apparent in Mr. Andersen’s approach to date. K&M in its
12 opposition (p. 2; ECF 88) suggests there is no market for the Debtor’s minority
13 interest in K&M, and at the same time urges that its appraiser will produce a “fair
14 market value” for the interest. This is more than a little contradictory. Sound
15 professional appraisers endeavor to place a value on property which will not be
16 sold (as in the estate tax example), but do so with a thorough knowledge of and
17 approach to the market for similar properties and utilizing the full and correct
18 range of factors applied to such valuation. K&M and its chosen appraiser give
19 grounds for skepticism that this is what they would do.

20 d. Every California contract, including the Buy/Sell Agreement, includes an implied
21 covenant of good faith and fair dealing. *Ladd v. Warner Bros. Entertainment,*
22 *Inc.*, 184 Cal. App. 4th 1298, 1306 (Cal. App. 2d Dist. 2010). This is particularly
23 so when one party (as here K&M) has discretionary power affecting the rights of
24 the other party (here the Debtor). *Id.* The Committee is concerned that K&M
25 shows indications that it will not perform in the required manner with respect to
26 the treatment of the Debtor’s minority interest and its fair and equitable valuation
27 for professional appraisal purposes. The Committee will suggest below
28

1 protections that would enhance assurance that the Debtor's minority interest does
2 benefit from good faith and fair dealing in the buy/sell process.

3 3. Under the terms of the K&M Operating Agreement, the Debtor as a member is entitled to
4 access to "[a]ll books and records of the Company," and the right to inspect and copy
5 them at all reasonable times." Sec. 17.02 (ECF 88-3 at p. 15). The Committee is
6 informed that the Debtor has been requesting this access and information going back as
7 far as June, but has yet to receive it from K&M. The Committee has also approached
8 K&M informally seeking sufficient financial information to give the Committee an
9 adequate understanding of the value of the business and the Debtor's minority interest.
10 K&M indicates that it will be responsive, at least to some extent, to the Committee on
11 this topic, but the Committee does not yet have the requested information. Here too the
12 Committee will suggest below protection that could alleviate this concern.

13 4. Conditioning Any Relief from Stay re the Buy/Sell Agreement

14 Given the Committee's concerns noted above, the Committee urges that any relief from
15 stay granted to K&M to proceed under the Buy/Sell Agreement be conditioned as
16 follows:

- 17 a. The Debtor and the Committee should receive the information that the Operating
18 Agreement entitles a member to access and copy under Sec. 17.02. A period of
19 60 days should be provided for the information to be provided, and any disputes
20 to be resolved over whether it has adequately been provided. (The Committee has
21 committed to K&M that it would hold such information as confidential, subject to
22 usual procedures such as filing under seal if necessary, etc.)
- 23 b. An appraisal by K&M's chosen appraiser should be filed with the Court, and
24 served on the Debtor and the Committee.
- 25 c. The Debtor and/or the Committee should have the right to submit the Court an
26 independent appraisal from a qualified professional business valuation appraiser,
27 reviewing the appraisal provided by K&M and providing the independent
28 appraiser's own opinion of the value of the Debtor's interest in K&M. Such

1 independent appraisal should be filed and served within 21 days of the filing of
2 K&M's appraisal.

3 d. After the steps in (a), (b), and (c) have been completed, the matter of the value of
4 the Debtor's minority interest in K&M should be brought before the Court for
5 hearing, and a determination by the Court be made as to the fair market value of
6 the interest.

7 5. The Court has the power to condition relief from the automatic stay. Bankruptcy Code
8 § 362(d) ("such as by terminating, annulling, modifying, or conditioning such stay"). In
9 exercising this power, the Court has the authority to issue all appropriate orders in aid of
10 this provision of the Code. Bankruptcy Code § 105(a).

11
12 WHEREFORE, the Committee respectfully requests entry of an order:

- 13 1. Conditioning any relief granted to K&M on the Stay Relief Motion in the manner
14 provided in paragraph 4 above; and
15 2. Granting such other and further relief as the Court deems just and proper.

16 Dated: August 10, 2015

17 FOX ROTHSCHILD LLP

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19 By: /s/ Dale L. Bratton
20 Dale L. Bratton

21 Attorneys for Official Committee
22 of Unsecured Creditors
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